

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD R. GREEN)	
Claimant)	
VS.)	
)	Docket Nos. 253,916 & 261,591
KEY CONSTRUCTION, INC.)	
Respondent)	
AND)	
)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the September 21, 2004 Award of Administrative Law Judge John D. Clark in the above matters. Claimant filed a request for review and modification which was heard on May 25, 2004, arguing entitlement to an increase in claimant's award to a 28 percent permanent partial impairment to the body as a whole based upon the opinion of Philip R. Mills, M.D. The Workers Compensation Board (Board) held oral argument on April 22, 2005.

APPEARANCES

Claimant appeared by his attorney, John C. Nodgaard of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Matthew J. Schaefer of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). Additionally, the parties acknowledged at oral argument before the Board that the dispute in Docket No. 261,591, dealing with a series of accidents alleged through October 25, 2000, was no longer in dispute and, therefore, not before the Board for its consideration. The Board, therefore, dismisses the appeal in Docket No. 261,591.

ISSUES**DOCKET No. 253,916**

1. What is the nature and extent of claimant's injury or disability? More particularly, is claimant entitled to a review and modification of the Order issued by the Workers Compensation Board on December 31, 2003, which found claimant to have a 20 percent impairment of function to the body as a whole, reduced by a 7 percent impairment to the body as a whole for preexisting conditions, resulting in an award of a 13 percent permanent partial disability to the body as a whole for the injuries suffered on June 11, 1998?
2. Is K.S.A. 1997 Supp. 44-501(c) applicable in this matter?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was originally determined by Judge Clark on July 2, 2003, at which time claimant was awarded the 10 percent impairment of function to the body as a whole for the injuries to his low back on June 11, 1998. The matter was appealed to the Workers Compensation Board (Board), which found in its December 31, 2003 Order that claimant had a 20 percent impairment to the body as a whole, which was then reduced by a 7 percent impairment to the body as a whole for preexisting conditions under K.S.A. 1997 Supp. 44-501(c), resulting in a 13 percent impairment to the body as a whole final award. The matter was then appealed to the Kansas Court of Appeals, which, in its December 10, 2004 Memorandum Opinion, affirmed the Board's decision. Claimant filed a request for review and modification, which was heard before Judge Clark on May 25, 2004. At that time, Judge Clark determined that claimant was not entitled to a modification of the original Award.

In the original litigation, claimant suffered an accident on June 11, 1998, while lifting a water pump. This injury resulted in a December 18, 1998 L4-L5 discectomy performed by Richard Brannon, M.D., in Denver, Colorado. The matter was appealed to the Board, which modified the ALJ's 10 percent whole body award, finding, based upon the opinion of Philip R. Mills, M.D., in his July 3, 2002 report, that claimant had a 20 percent impairment of function to the body which was reduced by the 7 percent whole body preexisting impairment also based upon Dr. Mills' July 3, 2002 report.

Claimant was examined a second time by Dr. Mills on February 10, 2004, at the request of claimant's attorney. Dr. Mills found, at that time, claimant had a 28 percent impairment to the body as a whole based upon the fourth edition of the AMA

Guides,¹ finding that claimant's back injury satisfied the requirements of DRE Category V in the fourth edition of the *AMA Guides*,² which resulted in a 25 percent impairment to the body as a whole, plus an additional 3 percent impairment for pain. Dr. Mills had originally testified in this matter and, in his July 3, 2002 letter, stated that claimant was a Category IV under the DRE, which would be a 25 percent impairment to the body as a whole. At the time of Dr. Mills' May 12, 2004 deposition, he modified this opinion to state that he had originally awarded claimant a 25 percent impairment to the body as a whole and that should have been a DRE Category V, rather than a DRE Category IV. Dr. Mills also stated in his original opinion that, based upon the opinion of Timothy C. Fitzgibbons, M.D., from May 16, 1996, claimant had a 7 percent preexisting impairment. At the time of his deposition in 2004, Dr. Mills determined that the 7 percent impairment opinion on which he based his earlier opinion was incorrect and claimant had no preexisting impairment from the 1996 examination of Dr. Fitzgibbons.

Claimant was also evaluated by John F. McMaster, M.D., on May 25, 2004. This was Dr. McMaster's second examination of claimant, having seen claimant on January 15, 2003. Dr. McMaster disagreed with Dr. Mills, finding claimant did not satisfy the criteria of DRE Category IV or V, as claimant displayed no loss of motion segment integrity, which is required to satisfy the requirements of DRE Category IV or V. Dr. McMaster found claimant's physical condition to be unchanged and, in fact, noted that claimant may even be minimally improved from a subjective standpoint from what he observed in 2003. He found claimant to have a DRE Category III 10 percent impairment to the body as a whole based upon the fourth edition of the *AMA Guides*.³

The ALJ, in considering the opinions of both Dr. Mills and Dr. McMaster, found Dr. McMaster's opinion to be more persuasive. The Board agrees. The Board is disturbed by what appears to be an unexplained change of opinion by Dr. Mills from his 2002 examination of claimant to the 2004 examination, wherein he modifies his DRE Category rating and reverses his opinion regarding what, if any, preexisting impairment claimant may have suffered. The Board finds, based upon this record, that claimant has failed to prove an entitlement to review and modification of the Board's Order of December 31, 2003, wherein claimant was awarded a 13 percent impairment to the body as a whole for the injuries suffered on June 11, 1998. The Board, therefore, finds that the September 21, 2004 Award of Administrative Law Judge John D. Clark should be affirmed.

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² *Id.*

³ *Id.*

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated September 21, 2004, should be, and is hereby, affirmed in all regards.

IT IS SO ORDERED.

Dated this ____ day of July 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John C. Nodgaard, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director